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Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1995

THE STATE OF FLORIDA

Petitioner,

v.

FRANCIS A. DUPONT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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39 pp

QUESTION PRESENTED

IS A DEFENDANT SUBJECT TO CUSTODIAL INTERROGATION WHEN HE GOES TO A POLICE STATION ON HIS OWN VOLITION, IS GIVEN MIRANDA WARNINGS, IS PERMITTED TO RETURN HOME AND THEN VOLUNTARILY RETURNS TO THE POLICE STATION THE NEXT MORNING.

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OPINIONS BELOW

The order of the Supreme Court of Florida declining jurisdiction is not reported. [A-1].[1]

The opinion of the District Court of Appeal of Florida, Second District is reported at 659 So. 2d 405 (Fla. 2nd DCA 1995). [A-2].

The opinion of the District Court of Appeal of Florida, Second District denying the motion for rehearing is not reported.

The order of the trial court granting the motion to suppress statements is not reported. [A-9].

JURISDICTION

The Supreme Court of Florida rendered its order declining to exercise discretionary jurisdiction on December 19, 1995. This Court has jurisdiction under 28 U.S.C. § 1257(a).

1 · The symbol "A" followed by the appropriate number represents a citation to the materials contained in the Appendix to this pleading.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V,United States Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1 United States Constitution, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Francis A. Dupont, was the Respondent before the Supreme Court of Florida, the Appellee in the District Court of Appeal of Florida, Second District, and the defendant in the

criminal trial proceedings before the Sixth Judicial Circuit, in and for Pinellas County, Florida.

Dupont voluntarily went to the police station on July 6, 1992 to answer questions concerning a murder. He was advised of his *Miranda*[2] warnings, and signed a waiver form. [A-3]. Dupont was told that he was not under arrest and could leave at any time. At one point during the questioning, Dupont indicated that he wanted to leave. Officer Jack Soule told Dupont at least three times that he could leave if he wished, even standing and pointing to the door. When Dupont did not move, the officer sat back down and the two began conversing. [A-4]. After questioning, Dupont left the police station, and voluntarily returned to the police station the next morning to take a polygraph examination. The polygraph operator asked Dupont if he had been given his *Miranda* rights; Dupont responded affirmatively. The polygraph examiner informed Dupont the rights he had been given the night before applied to any statements that Dupont might make during the examination. Dupont was also advised that pursuant to the rights waiver form he had signed, any statements that he made would be given to the detectives. [A-5]. Dupont subsequently confessed by giving several statements.

Dupont was charged with Murder in the Second Degree.[3] He filed a motion to suppress his statements and a hearing was conducted. Officer Jack Soule testified that Dupont voluntarily came to the police station for questioning. [A-17]. Detective Gary Gibson also testified that Dupont came to the police station voluntarily and that he was not under arrest at the time of the interview. The police gave Dupont his *Miranda* rights even though he was never placed in custody or under arrest. Dupont signed the rights waiver form. De-

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2 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

3 The Second District Court of Appeal mistakenly stated that the charge was first degree murder. [A-2].

tective Gibson testified that before questioning began, Dupont was told that he was not under arrest and that he could leave at any time. [A-18].

The trial court granted Dupont's motion to suppress. [A-9]. The State appealed the lower court's orders suppressing Dupont's statements and confession.

The Second District Court of Appeal held that some of the statements made by Dupont were obtained in violation of *Miranda*. The Court held that Dupont voluntarily went to the police station for questioning. The Court also found that Dupont was in custody and that Dupont's request to end the interrogation it was unequivocal. [A-4]. The Court held that the fact that Dupont answered questions after he asked to leave did not validate the failure of the police to scrupulously honor his request. The Court found that *Miranda* warnings should have been read to Dupont before the interview resumed. The Court therefore upheld the lower court's suppression of Dupont's confession. [A-6].

The Second District Court of Appeal also acknowledged that Dupont voluntarily returned to the police station the next day to take a polygraph examination. [A-5]. The Court however found that the detective's statement to Dupont that his *Miranda* rights still applied was not a proper *Miranda* warning. According to the Court, Dupont should have been advised of his *Miranda* rights again before the polygraph exam. [A-5].

Based upon the foregoing analysis, the Second District Court of Appeal then held that any statements made by Dupont during the polygraph exam and the interview following the polygraph exam were properly suppressed. [A-6].

The State filed a notice to invoke the discretionary review of the Florida Supreme Court on October 3, 1995. [A-7]. The Florida Supreme Court declined jurisdiction on December 19, 1995. [A-7].

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW THAT THE INCRIMINATING STATEMENTS WERE OBTAINED WHEN THE RESPONDENT WAS NOT IN CUSTODY IN VIOLATION OF *MIRANDA V. ARIZONA* CONFLICTS WITH DECISIONS OF THIS COURT, DECISIONS OF THE UNITED STATES COURTS OF APPEAL OR DECISIONS OF APPELLATE COURTS OF OTHER STATES.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), this Court held:

> The prosecution may not use statements... stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

Id. at 444, 86 S.Ct. at 1611, 16 L.Ed. 2d at 706.

Miranda warnings are necessary only on those occasions when a suspect is undergoing actual custodial interrogation. Where the suspect is not in custody, *Miranda* warnings are not required. *Miranda v. Arizona*, 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed. 2d at 706; *see also Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed. 2d 317 (1984); *California v. Beheler*, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed. 2d 1275 (1983); *Roberts v. United States*, 445 U.S. 552, 100 S.Ct. 1358, 63 L.Ed. 2d 622 (1980); *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed. 2d 714 (1977); *Beckwith v. United*

States, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed. 2d 1 (1976). In *McNeil v. Wisconsin,* 501 U.S. 171, 182 n.3, 111 S.Ct. 2204, 2211 n.3, 115 L.Ed. 2d 158, 171 n.3 (1991), the Court stated: "We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other that 'custodial interrogation'...." And, in *Rhode Island v. Innis,* 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed. 2d 297 (1975) the Court observed: "The *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." Thus, a claim of a *Miranda* violation is without merit unless there was custodial interrogation. Further, the defendant has the initial burden of showing that he was subjected to custodial interrogation. *Stewart v. United States,* 431 U.S. 932, 97 S.Ct. 2640, 53 L.Ed. 2d 249 (1977).

The Court in *Miranda* established that custody occurs either upon formal arrest or under any other circumstances where the suspect is deprived of his freedom of action in any significant way. *Miranda,* 384 U.S. at 444, 86 S.Ct. at 1612. In determining whether a suspect is "in custody" at a particular time, a Court must examine the extent of the physical or psychological restraints placed on the suspect during interrogation in light of whether a "reasonable person in the suspect's position would have understood his situation" to be one of custody. *Berkemer v. McCarty,* 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed. 2d 317 (1984); *United States v. Carter,* 884 F.2d 368, 370 (8th Cir. 1989). If a person believes his freedom of action has been curtailed to a "degree associated with formal arrest," and that belief is reasonable from an objective viewpoint, then that person is being held in custody during the interrogation. *See California v. Beheler,* 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed. 2d 1275 (1983) (a person is 'in custody' when the police have formally arrested the person or restricted his or her freedom in any significant way). Whether the police restrict a person's freedom of action in any significant way is determined by the

totality of the circumstances. *California v. Beheler,* 463 U.S. at 1125, 103 S.Ct. at 3520.

The most obvious and effective means of demonstrating that a suspect has not been "taken into custody or otherwise deprived of...freedom of action," *Miranda,* 384 U.S. at 444, 86 S.Ct. at 1612, is for the police to inform the suspect that an arrest is not being made and that the suspect may terminate the interview at will. Where a suspect has been so advised custody has frequently been found to not exist.[4] Moreover, the lack of restraint on a suspect's freedom of movement during questioning is also a factor indicating the absence of custody[5] and the fact that questioning occurs in a police station does not necessitate a finding of custody unless the objective circumstances suggest that the suspect is being held against his will. *Berkemer v. McCarty,* 468 U.S. at 442,

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4 *Davis v. Allsbrooks,* 778 F.2d 168, 171 (4th Cir. 1985) (informing a suspect that he was not under arrest is one factor frequently considered to show lack of custody, *citing, Oregon v. Mathiason,* 429 U.S. at 495, 97 S.Ct. at 714)); *United States v. Helmel,* 769 F.2d 1306 (8th Cir. 1985) (significant to finding lack of custody was that the suspect was specifically informed that he was not under arrest). *See, e.g., United States v. Goudreau,* 854 F.2d 1097 (8th Cir. 1988) (finding of custody mitigated where agents explained that the interview was voluntary and suspect was not placed under arrest); *United States v. Hocking,* 860 F.2d 769, 773 (7th Cir. 1988) (Finding of custody mitigated where suspect was aware he was not compelled to answer questions). *See also Leviston v. Black,* 843 F.2d 302, 304 (8th Cir. 1988) (no custody where suspect was unaware that he was free to leave upon his own request).

5 *See, State v. Phipps,* 331 N.C. 427, 418 S.E.2d 178 (N.C. 1992) (no custody where suspect had come to police station on his own several times, and was permitted to return home each time); *Chao v. State,* 604 S.2d 1351 (Del. Super. Ct. 1992) (no custody where suspect was told that she could leave at any time, suspect was not restrained in any way and upon completing the interview the police left suspect in the public lobby free to go); *People v. Holmes,* 626 N.E.2d 412 (Ill. App. 5th Dist. 1994), *cert. denied,* 638 N.E.2d 1120 (no custody where suspect was not compelled to come to the sheriff's office. A request was made and suspect went voluntarily. There was no indication that suspect was induced to accompany the officers to the sheriff's office against his will).

104 S. Ct. at 3151.[6] For example, in *Oregon v. Mathiason*, a burglary suspect was invited to come to the police station,

6 In *Commonwealth v. Morgan*, 610 A.2d 1013 (Pa. Super. 1992), *Alloc. denied*, 619 A.2d 700, the suspect was found not to be in custody where she came to and remained at the police station of her own volition. She was also repeatedly advised, as in the instant case, that she was free to leave at any point. She was also advised of her *Miranda* rights while at the police station. The fact that makes the instant case unique also occurred in *Commonwealth v. Morgan*. The police officers involved in both cases took the precautionary step of reading *Miranda* rights to a non-custodial suspect. After the rights were read, the defendant then exercised his rights. The trial court, in *Commonwealth v. Morgan*, held that it was this fact that rendered the confession presumptively coerced. The Superior Court of Pennsylvania did not agree. The Court held that the failure to honor a non-custodial suspect's request for an attorney, made after *Miranda* rights have been read to a suspect does not render a subsequent confession presumptively coerced. In finding that the suspect in *Commonwealth v. Morgan*, was not legally in custody the Court noted that the "mere giving of *Miranda* warnings does not render an investigatory detention custodial." 610 A.2d at 1015, citing *Commonwealth v. Douglass*, 372 Pa. Super. 227, n.9, 539 A.2d 412, 423, n.9 (1988), *Alloc. denied*, 552 A.2d 250.

In *Hughes v. Commonwealth of Virginia*, 431 S.E.2d 906, 916 (Va. App. 1993), a suspect was drive to the police station by police after officers asked if he would come with them to "help them out." The defendant in *Hughes* testified that he did not even know the police were taking him to the police station. He further testified that if he had known that he would not have gone with the police officers. At the end of the interview the police asked Hughes if they could have the clothes that he had worn to the party where the child victim had disappeared. The police drove Hughes to his home where Hughes took his clothes and sneakers out of the dryer, and gave them to the police officers. Later that day after the police had searched Hughes' automobile they telephone Hughes and asked him to come back to the police station. Hughes agreed to do so if his wife could come with him and if the police would transport them to the police station because the police had his car. A police officer picked Hughes and his wife up and drove them to the police station. At the station Hughes took a polygraph examination. The officer performing the examination informed Hughes that he was not under arrest and that he did not have to take the polygraph test, and that he was free to leave at any time. Hughes was still not advised of his *Miranda* rights. The Court held that the incriminating statements made during the pre-test interview before the polygraph examination were admissible as the conditions surrounding the defendant's return to the police station for the polygraph examination did not indicate any significant deprivation of his freedom of action. The Court concluded that the statements Hughes made were not the result of a custodial interrogation.

where he sat across a desk from his interrogator and behind closed doors. The police interrogator falsely stated that the suspect's fingerprints had been found at the burglary scene. At the end of the interrogation, the suspect was not arrested and was released. The Oregon Supreme Court reversed a subsequent conviction, holding that "the interrogation took place in a coercive environment of the sort to which *Miranda* was intended to apply." This Court reversed, holding that the situation was non-custodial:

> [T]here is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a half hour interview respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody 'or otherwise deprived of his freedom of action in any significant way.'

429 U.S. at 495, 97 S.Ct. at 714.

Francis Dupont was not subjected to a "custodial interrogation" within the meaning of *Miranda*. He voluntarily went to the police station for questioning, and was told that he was not under arrest and that he could leave at anytime. The police nevertheless read Dupont his *Miranda* rights and Dupont signed the *Miranda* rights waiver form. At one point during questioning, Dupont indicated that he wanted to leave. Officer Jack Soule got out of his chair and pointed to the door, told Dupont at least three times that he could leave if he wanted, and pointed Dupont to the door. Only after Dupont failed to move, the officer sat back down and began the questioning again. After the questioning, Dupont left the police station, and voluntarily returned the next day to take a polygraph examination. Detective Jerry Davis informed

Dupont that his *Miranda* warnings from the night before applied during the polygraph examination.

The Second District Court of Appeals erroneously held that Detective Davis's statement to Dupont the next morning that his *Miranda* rights still applied from the night before was not a proper *Miranda* warning. The Court held that even though Dupont went home after he invoked his right to remain silent, he should have been properly advised of his *Miranda* rights again before the polygraph examination. The Court found that the lower court properly suppressed Dupont's statements made during the polygraph exam and the interview immediately following the polygraph exam.

Miranda warnings were not required because Dupont was not "in custody" and was not being "interrogated" within the meaning of *Miranda*. For example, in *People v. McCue*, 362 N.E. 2d 760 (Ill. 1977) the Court held that the failure of the polygraph examiner to administer *Miranda* warnings to a defendant prior to the polygraph examination did not render inadmissible a confession made following polygraph examination. The Court noted the defendant voluntarily came to the sheriff's office for the polygraph test and, although free to leave at any time, continued to answer questions until he ultimately confessed. Where a person is not in custody or otherwise deprived of his freedom in any significant way, *Miranda* warnings were found unnecessary.

The Second District Court of Appeal acknowledged that "Dupont voluntarily went to the police station for questioning. During questioning, Dupont indicated that he wanted to leave. After Dupont's unequivocal request to end the interrogation, the police erroneously failed to stop the interview for a significant period of time. *See Mosley.*" [A-4]. The Court further observed: "The next morning, Dupont voluntarily returned to the station at approximately 10:00 a.m. for a polygraph. Detective Jerry Davis, the polygraph operator, testified, 'I reminded him that his *Miranda* rights still applied during the polygraph examination'." [A-5].

The District Court of Appeal erroneously held that Dupont's request to end the interrogation was unequivocal. [A-4]. In *Davis v. United States*, 512 U.S.__, 114 S.Ct. 2350, 129 L.Ed. 2d 362 (1994), the Court held that, if a suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him. The *Davis* decision was based upon the rule announced in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981), which held that law enforcement officers must immediately cease questioning a suspect who is subject to custodial interrogation, who received *Miranda* warnings, and who waived the rights to remain silent and to have counsel present during a custodial interrogation. Because Dupont was never subjected to a custodial interrogation, he was never a suspect in custody, unlike the situations in *Davis v. United States* and *Edwards v. Arizona*. Those cases therefore have no applicability.

There are compelling reasons to grant the petition. The decision below is the end result of a mistaken interpretation of the rights to counsel provided by the Fifth and Fourteenth Amendments to the United States Constitution. The *Miranda* litany is a palliative only against the unique pressures inherent in a custodial interrogation.

CONCLUSION

The petition for writ of certiorari should be granted because the decision below of the Second District Court of Appeal of Florida directly conflicts with the decision of this Court in *Miranda v. Arizona, Davis v. United States,* and *Edwards v. Arizona.* The decision incorrectly interprets the right to counsel provided by the Fifth and Fourteenth Amendments to the United States Constitution. The State of Florida respectfully requests that this Court grant its Petition for a Writ of Certiorari to the Supreme Court of Florida and summarily reverse based on the authorities cited.

Respectfully submitted,

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October Term, 1995

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

APPENDIX

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Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court A-7

In the Circuit Court of the Sixth Judicial Circuit, in and for Pinellas County, Florida, order granting defendant's motion to suppress dated November 19, 1992 . . . . A-9

Excerpts from August 26, 1993 Transcript of hearing on motion to suppress, in *State of Florida vs. Francis A. Dupont,* Case No. 92-10456-CFANO-I, in the Circuit Court of the Sixth Judicial Circuit, Pinellas County, Florida A-14

SUPREME COURT OF FLORIDA
TUESDAY, DECEMBER 19, 1995

STATE OF FLORIDA,
Petitioner,

v.

FRANCIS A. DUPONT,
Respondent.

CASE NO. 86,595
DISTRICT COURT OF APPEAL
2nd District — No. 93-04221

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V,Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court.

See Fla.R.App.P. 9.330(d).

GRIMES, C.J. OVERTON, SHAW, KOGAN and ANSTEAD, JJ., concur

A True Copy
Test:
/s/ SID J. WHITE
Clerk, Supreme Court

Hon. William A. Haddad, Clerk,
Hon. Karleen F. DeBlaker, Clerk
Hon. Claire K. Luten, Judge
Ms. Roberta G. Mandel
Ms. Deborah K. Brueckheimer

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA,
Appellant,

vs. CASE NO. 93-04221

FRANCIS A. DUPONT,
Appellee.

Opinion filed August 2, 1995

An Appeal from a nonfinal order of the Circuit Court for Pinellas County; Claire K. Luten, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Roberta G. Mandel, Assistant Attorney General, Miami for Appellant

WHATLEY, Judge.

The State of Florida challenges several trial court orders suppressing statements Francis A. Dupont made to police in connection with his charge for first-degree murder. On appeal, we review three rulings made by the trial court: police psychologically coerced Dupont to make involuntary statements; police violated Dupont's *Miranda*[2] rights during his interrogation; and police violated Dupont's due process rights

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2 *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 2d 694 (1966).

by failing to record his interrogation. We affirm in part and reverse in part.

First, we conclude that Dupont's statements were not the product of coercive police conduct. To establish that a statement is not voluntary, there must be a finding of coercive police conduct. *Colorado v. Connelly,* 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) (A defendant's perception of coercion, which is solely caused by his unique mental status, is not a factor). Dupont was given food, drink, and cigarettes. He was provided with sufficient opportunity to sleep. The atmosphere was conversational. No promises or threats were made to Dupont, and his questioning was not excessively lengthy.[3] *See State v. Sawyer,* 561 So. 2d 278 (Fla. 2d DCA 1990). Based on the totality of the circumstances, we find that the police did not psychologically coerce Dupont into making involuntary statements. *See State v. Chavis,* 546 So. 2d 1094 (Fla. 5th DCA 1989), *cert. denied,* 493 U.S. 1046, 110 S. Ct. 845, 107 L. Ed. 2d 839 (1990).

Second, we conclude that some of the statements made by Dupont were obtained in violation of *Miranda.* On July 6, 1992, Dupont was asked to accompany detectives to the police station to answer questions. Dupont was read *Miranda* at approximately 10:00 p. m. At the motion to suppress hearing, Dupont stipulated to the sufficiency of these warnings.

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3 Dupont did not testify at the hearing. However, he presented experts who testified as to what Dupont told them happened during the interviews. We note that experts may base their opinion on facts which are not necessarily admissible into evidence. *Department of Corrections, State of Florida v. Williams,* 549 So. 2d 1071 (Fla. 5th DCA 1989). However, an expert may not be used as a conduit to introduce otherwise inadmissible hearsay evidence. 549 So.2d at 1072; *Walker v. State,* 353 So. 2d 968 (Fla. 3d DCA 1978). Dupont's statements to the experts were hearsay and were not otherwise admissible. Consequently, the experts should not have been allowed to testify regarding the substance of these statements.

Dupont was questioned for approximately two hours. Around midnight, Dupont became angry and said that he wanted to leave. At this point, Detective Jack Soule stood up and pointed to the door. Detective Soule told Dupont at least three times that he could leave if he wanted to leave. Dupont did not move or make any statements. After a brief pause, the conversation resumed. *Miranda* was not again read to Dupont. No inquiry or clarification was made regarding Dupont's wish to leave. The interview concluded at 12:35 a.m.

Once a suspect indicates a desire to remain silent, questioning must cease. *Michigan v. Mosley,* 423 U.S. 96, 96 S.Ct. 321, 46 L. Ed. 2d 313 (1975). Following an equivocal request to remain silent, police may only question a suspect to clarify the invocation of the right to remain silent. In *State v. Wininger,* 427 So. 2d 1114 (Fla. 3d DCA 1983), the defendant volunteered to answer questions at the police station. When the police told Wininger that he was a suspect, he indicated that he wanted to go home. The police continued questioning Wininger. The *Wininger* court held that when the defendant said that he wanted to go home, police should have either clarified the defendant's wishes or stopped the interview.

Similarly, Dupont voluntarily went to the police station for questioning. During questioning, Dupont indicated that he wanted to leave. After Dupont's unequivocal request to end the interrogation, police erroneously failed to stop the interview for a significant period of time. *See Mosley.* If police were in doubt as to the meaning of Dupont's request to leave, then further inquiry should have been limited to clarify Dupont's wishes. *See Wininger.* The fact that Dupont answered questions after he asked to leave does not validate the failure of police to scrupulously honor his request. *See Christopher v. State of Florida,* 824 F. 2d 836 (11th Cir. 1987), *cert. denied, Dugger v. Christopher,* 484 U.S. 1077, 108 S. Ct. 1057, 98 L. Ed. 2d 1019 (1988).

The State argues that detectives could properly initiate a conversation with Dupont when he did not leave. The state

correctly asserts that, after initially invoking *Miranda* rights, a suspect may again waive those rights by initiating conversation with police. *Durocher v. State,* 596 So. 2d 997 (Fla. 1992). However, in the present case, Dupont did not initiate the conversation with police. When Dupont did not leave, the police again initiated the interview. Furthermore, *Miranda* warnings were not read to Dupont before the interview resumed as required by *Mosley. See State v. Chavis,* 546 So. 2d 1094 (Fla. 5th DCA 1989). Consequently, any statement that Dupont made on July 6, after he indicated that he wanted to leave, was properly suppressed.

The next morning, Dupont voluntarily returned to the station at approximately 10:00 a.m. for a polygraph. Detective Jerry Davis, the polygraph operator, testified, "I reminded him that his Miranda rights still applied during the polygraph examination, as far as any statements he made to me could be used—given back to the detectives as, per se, to the waiver." No additional *Miranda* warnings were given to Dupont.

At around 12:03 p.m., Detective Soule observed Dupont leaving the polygraph room. They spoke briefly in the breezeway of the police station and went back to the interview room, where Detective Gary Gibson joined them. The interview concluded at approximately 2:30 p.m. Dupont was not given *Miranda* warnings during this interview.

We find that Detective Davis's statement to Dupont, that his *Miranda* rights still applied, was not a proper *Miranda* warning. Although Dupont went home after he invoked his right to remain silent, he should have been properly advised of his *Miranda* rights again before the polygraph exam. *See United States v. Skinner,* 667 F. 2d 1306 (9th Cir. 1982), *cert. denied,* 463 U.S. 1229, 103 S.Ct. 3569, 77 L. Ed. 2d 1410 (1983); *Durocher; Perry v. State,* 522 So. 2d 817 (Fla. 1988); *Keys v. State,* 606 So. 2d 669 (Fla. 1st DCA 1992).

The polygraph exam was conducted more than 12 hours after Dupont was first read *Miranda*. In addition, when Dupont attempted to invoke his right to remain silent, his request was not scrupulously honored nor clarified. Consequently, it was important that Dupont's *Miranda* rights be explained to him, including his right to remain silent, before the polygraph exam. Further, *Miranda* should have been explained to Dupont before the interview, which immediately followed the polygraph exam. We hold that any statements made by Dupont during the polygraph exam and the interview immediately following the polygraph exam were properly suppressed.

Third, the trial court found that the failure of police to record the interviews with Dupont violated his due process rights. We disagree. While the better practice would be to record interviews and confessions, police are not required to do so. *State v. Williams*, 386 So. 2d 27 (Fla. 2d DCA 1980). Therefore, the failure of police to record Dupont's statements did not per se violate his due process rights.

Accordingly, based on *Miranda* violations, we affirm the suppression of Dupont's statements to police on July 6, after he invoked his right to remain silent, and all statements that Dupont made to police on July 7 during the polygraph exam. We reverse the suppression of Dupont's remaining statements to police insofar as his statements were not involuntarily made as a result of police coercion. Finally, we reverse the trial court's finding that the failure of police to record Dupont's statements violated his due process rights.

CAMPBELL, A.C.J., and FRANK, J., concur.

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

THE STATE OF FLORIDA,
Appellant,

vs. CASE NO. 93-04221

FRANCIS A. DUPONT,
Appellee.

NOTICE TO INVOKE DISCRETIONARY JURISDICTION OF THE FLORIDA SUPREME COURT

Notice is hereby given that the State of Florida, the Appellant in the District Court of Appeal, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered on August 2, 1995. The decision expressly and directly conflicts with the Florida Supreme Court's decision in *State v. Traylor,* 596 So. 2d 957 (Fla. 1992).

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

/s/ Roberta G. Mandel
ROBERTA G. MANDEL
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Florida Bar No. 0435953

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mls/

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing NOTICE TO INVOKE DISCRETIONARY JURISDICTION OF THE FLORIDA SUPREME COURT was furnished by mail to DEBORAH K. BRUECKHEIMER, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000—Drawer PD, Bartow, Florida 33831, on this 3rd day of October, 1995.

/s/ Roberta G. Mandel
ROBERTA G. MANDEL
Assistant Attorney General

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT
PINELLAS COUNTY, FLORIDA

THE STATE OF FLORIDA,
Appellant,

vs. CASE NO. CRC92-10456CFANO

FRANCIS A. DUPONT,
Appellee.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS #2

THIS MATTER was heard by the Court on August 26, 1993. Having received testimony and heard arguments of counsel, the Court finds:

FACTS

On July 6, 1992, the Defendant was interviewed as a strong suspect in a murder. He was advised of *Miranda* with the additional caveat that the giving of those rights did not mean he was under arrest or was going to be arrested.

During a confrontation, the Defendant stated that he felt the police were trying to make him admit to something he did not do. He said he wanted to leave.

There is a conflict whether the Defendant was advised he could simply go if he wanted, or was additionally told that if he did leave he would not be helping the police solve this case. It is clear, however, that no attempt was made by police to clarify the Defendant's statement. Nor was *Miranda* reread. The interrogation simply continued.

On July 7, 1992, the Defendant returned to take a polygraph. The polygraph operator asked if he had been given *Miranda;* the Defendant said yes; the operator reminded him the rights applied during the polygraph examination. No new *Miranda* warnings were given either before the polygraph or before the subsequent interrogation.

The Defendant argues when he stated he felt he should leave, this constituted an equivocal invocation of his 5th Amendment rights. He argues that it was incumbent on the police to readvise him or to otherwise clarify his request before questioning was continued.

It is clear that the Defendant believed he was being pressured to confess, and considered leaving because of this pressure. The fact that he did not leave in and of itself does not indicate a waiver. If a suspect indicates in any manner that he does not wish to be interrogated, questioning must stop. *Traylor v. State,* 596 So. 2d (Fla. 1992). *See also Martinez v. State,* 564 So. 2d 1071 (Fla. 1990). Even if the Defendant initiates conversation, police are required, if they choose to reinterrogate, to make certain the purported waiver if fully and voluntarily made. *Oregon v. Bradshaw,* 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983).

The case law is clear that where such an equivocal invocation occurs, "...further questioning must be restricted to clarify that request...." *U.S. v. Pena,* 897 F.2d 1075 (11th Cir. 1990); *Michigan v. Mosley,* 423 U.S. 96, 96 S.Ct. 321, 46 L. Ed. 2d 313 (1975).

When a defendant expresses apparently conflicting desires to cooperate and to remain silent, there must be clarification to establish that law enforcement "scrupulously honor" the defendant assertion of his rights. *U.S. v. Pena,* infra.

Mosley indicates that there are four factors to be considered in determining if the Defendant's right have been scrupulously honored:

a) did the interrogation cease immediately?

b) did a significant period of time pass before questioning resumed?

c) did the police give fresh *Miranda* warnings?

d) did the later questioning relate to a different case?

See also *State v. Belcher,* 530 So. 2d 303 (3d DCA 1988); *Henry v. State,* 574 So. 2d 66 (Fla. 1991).

Clearly none of these conditions was met; the interrogation about the murder continued immediately without any additional *Miranda* warnings and without any clarification of the Defendant's statement.

It is not enough that the Defendant responds to questioning. There must be a knowing and intelligent waiver of a "known right, or privilege." *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L. Ed. 2d 378 (1981).

In looking at the totality of the circumstances, this Court is not persuaded that there was a knowing and voluntary waiver by the Defendant of his 5th Amendment rights.

On July 7th, the Defendant, now even a stronger suspect, appeared for a polygraph. He was not re-*Mirandized* before the examination. Following the examination he was again interrogated. No *Miranda* warnings were given before this questioning.

The State contends that it was sufficient to simply tell a defendant that the rights read the previous day still apply. But even that was not done here. The Defendant was simply told the rights carried over to the polygraph. He was never readvised then or before interrogation.

In *Escobedo v. Illinois,* 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), the Supreme Court concluded that in-custody interrogations contain inherently compelling pressures "which work to undermine the individuals' will to resist and to compel him to speak where he would not otherwise do so." *Id* at 467, 86 S. Ct. 15 1624. It is precisely this pressure that caused the defendant to state he felt he should leave. And on the second day, where the defendant without new *Miranda* warnings, takes a polygraph, and is told he has failed the polygraph, how much more compelling pressure can be placed on him? Nor can it be presumed that on the second day, the defendant knew his rights—especially when viewed with police action of the first day. The Defendant could well believe that even though he wanted to stop the questioning, the police would not honor his request. *See Tukes v. Dugger,* 911 F. 2d 508 (11th Cir. 1990); ft nt 11, at 576.

The burden is upon the State to show the Defendant knowingly and intelligently waived his *Miranda* warning. It has not done so.

Even had the comments by Davis met the requirements of *Miranda*—and this Court does not believe they do—such comments limited the application of the *Miranda* warnings to the polygraph test. It is incumbent upon the St. Petersburg Police Department to readvise the defendant of his *Miranda* warnings; they failed to do this.

Under the totality of the circumstances, the Court cannot find the Defendant's statements were freely, voluntarily and knowingly made based upon the failure of law enforcement officers to clarify the Defendant's equivocal request of July 6th, and to re-*Mirandize* the Defendant on July 7, 1992. It is therefore

ORDERED AND ADJUDGED Defendant's Motion to Suppress #2 be, and the same is hereby granted.

DONE AND ORDERED in chambers, at Clearwater, Pinellas County, Florida, this 19 day of November, 1992.

/s/ Claire K. Luten
CLAIRE K. LUTEN, Circuit Judge

Copies furnished to:
Richard Sheinis, Assistant State Attorney
Chris E. Thom, Assistant Public Defender
Counsel for Defendant, Francis Dupont

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT
PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA,

vs. CIRCUIT CRIMINAL
NO. 92-10456-CFANO-I

FRANCIS A. DUPONT,
Defendant.

PROCEEDINGS: MOTION TO SUPPRESS

BEFORE: Honorable Claire K. Luten,
Circuit Judge

DATE: August 26, 1993

PLACE: Courtroom B
Criminal Court Complex
5100 144th Avenue North
Clearwater, Florida 34620

REPORTED BY: Robin S. McCormick, RPR
Deputy Official Court Reporter

APPEARANCES: MR. RICHARD SHEINIS
and
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Clearwater, Florida 34620

[112] JACK SOULE, the witness herein, having been first duly sworn, was examined and testified as follows:

[THE COURT]: You may proceed.

. . . .

[118]Q. Was Miranda given to the defendant?

A. Yes.

Q. And who was present at this time, ten o'clock?

A. Myself and Detective Gibson.

Q. And the defendant?

A. And the defendant, of course.

Q. Who actually went over Miranda with the defendant?

A. Detective Gibson.

Q. But were you present for that?

A. Yes, I was.

Q. And did you sign as a witness on the Miranda form?

A. Yes, I did.

. . . .

[120]Q. During the course of the interview, now, was there a point where the defendant became angry with you, expressed that he was angry?

A. Yes.

. . . .

[121]Q. And what happened then?

A. I stood up out of my chair and I pointed to the door, and I told him at least three times he could leave if he wanted to right now, that there is the door right there. "You could leave."

Q. Actually physically pointing to the door?

A. Yes.

Q. And what did the defendant do?

A. He sat there.

Q. What did you do?

A. After there was no movement, I sat back down, and we started talking again.

Q. And at that point, did the defendant resume the conversation with you when you asked him questions?

A. Yes.

Q. How long did the interview continue until that Monday night?

[122]A. The interview was terminated at 12:35 A.M.

. . . .

Q. And at this point had the defendant been placed under arrest?

A. No.

Q. How did the defendant get home that evening?

A. Myself and Detective Gibson took him home in our car.

Q. Was the defendant informed that you wanted to give him a polygraph the next morning?

A. Yes.

. . . .

[123]Q. And how did he get back to the station the next day?

A. He showed up on his own. I don't know if he walked or took—I assumed he walked.

Q. But yourself or Detective Gibson did not pick him up?

A. No.

. . . .

[129]Q. At what point was this interview concluded?

A. 2:30 P.M. on the same day.

Q. And was Francis Dupont placed under arrest at that time?

A. Yes, he was.

. . . .

[269] GARY GIBSON, the witness herein, having been first duly sworn, was examined and testified as follows:

. . . .

[273]Q. ...who was present when you read him Miranda?

[275]Q. At this point what was his custody status?

A. He was there in a voluntary basis. I just read him his rights because we were going to ask him questions.

Q. Did you explain—either before or after the Miranda, did you explain to the defendant what his status was in regards to custody or freedom to leave?

A. Detective Soule, I believe, told him he was free to go at any time.

Q. Was anything else said to him in order to explain Miranda or qualify Miranda in any way?

A. No. I said, "Simply because I'm reading the Miranda form, doesn't mean you are under arrest at this time."

. . . .

[277]Q. Did there come a time when the defendant ever indicated his desire to leave that room?

A. Yes, sir.

. . . .

[278]Q. And what happened exactly?

A. Basically, Detective Soule was speaking to Mr. Dupont. Mr. Dupont went on to say that the police were trying to get him to say something that he didn't feel was correct. At which time Detective Soule stood up and pointed to the door. I just stood up, like this, and just scooched my chair back a little bit. Detective Soule pointed to to door, and said, "You are free to go at any time."

Q. Why did you stand up?

A. Basically, Detective Soule—as soon as Mr. Dupont got done speaking, he stood up and pointed to the door. I stood up, basically, reacting to Detective Soule standing up, and I just stood, as well.

Q. Did the interview terminate at that time?

A. No.

Q. Why not?

A. The conversation just broke up.

Q. Did the defendant take any action?

A. No. He just sat there.

Q. Did he ever stand up?

A. No.

. . . .

[279]Q. How did the interview end?

A. Basically, he advised Detective Soule that he would volunteer to come to the station the following morning around ten o'clock for a polygraph.

. . . .